IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979 TERM

79-2066

Supreme Court, U. S.
FILED
JUN 28 1980
MICHAEL RODAK, JR., CLERK

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs, Appellants,

v Case No.

RICHARD H. AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN; OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and THE HONORABLE NORMAN R. BARNARD, LYNN D. ALLEN, and C. HUGH DOHANEY, as Members thereof; MICHIGAN STATE BOARD OF CANVASSERS and BERNARD J. APOL, NANCY CHASE, JESSIE M. DILLARD, WALTER OLIVER, and WALLACE D. RILEY, as Members thereof; THE OAKLAND COUNTY BOARD OF CANVASSERS and BARBARA A. BRINKER, SARAH C. DICKSON, SANDRA KOKOTOVICH, PATRICIA A. SANDERSON, and LYNN D. ALLEN, as Members thereof; and BERNARD J. APOL, as Director, BOARD OF ELECTIONS,

Defendants, Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979 TERM

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Defendants, Appellees.

---/

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED ON APPEAL

I. DOES THE CONSTITUTION OF MICHIGAN (1963), ARTICLE VI, SECTION 19, WHICH PROHIBITS A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY CREATING AN IRREBUTTABLE PRESUMPTION OF UNFITNESS FOR OFFICE?

Appellants Respond: "YES"

II. DO THE MICHIGAN CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH PROHIBIT A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Appellants Respond: "YES"

III. IS MANDAMUS THE APPROPRIATE PROCEEDING TO ADJUDICATE THE CONSTITUTIONALITY OF THE MICHIGAN CONSTITUTIONAL AND STATUTORY PROVISIONS PROHIBITING A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS?

Appellants Respond: "YES"

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I. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(a) NATURE OF THE PROCEEDING

This is an appeal from the decision of the Michigan State Court of Appeals, entered May 9, 1980, dismissing the Plaintiffs-Appellants' Complaint for Mandamus, and from a decision of the Michigan State Supreme Court, entered June 19, 1980, denying leave to appeal. Said decisions have not been reported, but are attached hereto for this Honorable Court's consideration and review.

This action is a proceeding for mandamus within the original jurisdiction of the Michigan State Court of Appeals pursuant to MSA 27A.4401, MCLA 600.4401, and Michigan General Court Rule, 1963 714.1. The Plaintiffs-Appellants filed a Complaint for Mandamus in the Michigan Court of Appeals challenging the constitutionality of certain mandatory retirement provisions for judges, hereinafter set forth, and seeking a Writ of Mandamus to compel the elections officials of the State of Michigan to place the name of the Plaintiff-Appellant, the Honorable William John Beer, on the ballot for the August, 1980 primary election and the November, 1980 general election for the office of Circuit Judge for the County of Oakland, Michigan.

On May 9, 1980, the Michigan Court of Appeals entered an Order dismissing the Plaintiffs-Appellants' Complaint for Mandamus, thereby ruling in favor of the constitutionality of the challenged mandatory retirement provisions which are hereinafter set forth. On June 19, 1980, the Michigan Supreme Court denied the Plaintiffs-Appellants' leave to Appeal from the decision of the Michigan Court of Appeals. Therefore, the Plaintiffs-Appellants have exhausted all State remedies and are appealing from a decision of the highest state court available to render a decision.

(b) STATUTORY PROVISION UPON WHICH JURISDICTION IS INVOKED.

Jurisdiction is properly conferred upon this Honorable Court pursuant to 28 USC 1257(2):

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(c) CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE.

A. The Constitution of Michigan (1963), Article VI, Section 19, which provides in pertinent part:

> "No person shall be elected or appointed to a judicial office after reaching the age of seventy (70) years."

B. MSA 6.1411, MCLA 168.411, which provides in pertinent part:

> "No person shall be eligible to the office of judge of the Circuit Court who is not a qualified elector of the judicial circuit in which election is sought, as provided in Section 11 of Article VI of the State Constitution, who is not licensed to practice law in the State and who at the time of election is seventy (70) years of age or older."

C. MSA 6.1413(1), MCLA 168.413(a) which provides:

> "Any incumbent Circuit Court Judge may become a candidate in the primary election for the office of which he is an incumbent by filing with the Secretary of State, an Affidavit of Candidacy not less than 120 days prior to the date of the primary election. The Affidavit of Candidacy shall contain statements that the Affiant is an incumbent Circuit Court Judge for the Circuit in which election is sought, that he is domiciled within the Circuit, that he will not attain the age of seventy (70) by the date of election, and a declaration that he is a candidate for election to the office of Circuit Court Judge."

(d) FACTS OF THE CASE.

A. Plaintiff-Appellant, the Honorable William John Beer, is a Judge of the Circuit Court for the County of Oakland, State of Michigan, having been first elected to said office on April 6, 1959. He was last re-elected to said office on November 5, 1974, and holds his office pursuant to a Certificate of Election issued by the Secretary of the State of Michigan on November 27, 1974.

Judge Beer was born on February 17, 1909. Judge Beer desires to run for re-election to said office in the August 5, 1980 primary election and in the November, 1980 general election.

B. Plaintiffs-Appellants, Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, are residents of Oakland County, Michigan, are registered voters therein and desire to vote for the Honorable William John Beer for the office of Circuit Judge for the County of Oakland in the August, 1980 primary election and in the November, 1980 general election.

C. On or about March 17, 1980, the Honorable William John Beer tendered his Affidavit of Candidacy for judicial office to Defendant, Bernard J. Apol, Michigan State Director of Elections, together with all other requisite documents as required by the Constitution and statutes of the State of Michigan. Mr. Apol is vested with the powers and performs the duties of the Michigan Secretary of State with regard to the supervision and administration of the election laws, while under the Secretary's direction.

D. On March 20, 1980, George H. Herstek, Jr., Deputy Director, Elections Division, acting on behalf of Mr. Apol, and under color of the aforementioned Michigan Constitutional and statutory provisions, rejected Judge

Beer's Affidavit of Candidacy for re-election to judicial office solely by reason of Judge Beer's age.

E. On April 4, 1980, Judge Beer filed a Complaint for Mandamus in the Michigan Court of Appeals to compel the State elections officials to place his name on the ballot, alleging that the aforementioned Constitutional and statutory mandatory retirement provisions of the State of Michigan, pursuant to which Mr. Herstek rejected Judge Beer's Affidavit of Candidacy, are unconstitutional under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that said provisions create an irrebuttable presumption of Judge Beer's incompetency to hold judicial office and deny him the right to continue to hold judicial office, without any form of hearing or determination as to his fitness for said office, contrary to principles of due process. Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, joined as Plaintiffs in the within action alleging that the aforementioned constitutional and statutory mandatory retirement provisions for judges deprive them of their rights under the First and Fourteenth Amendments to the Constitution of the United States to vote for the candidate of their choice, the Honorable William John Beer, for the office of circuit judge for the County of Oakland, Michigan, in the August, 1980 primary election and the

November, 1980 general election.

F. On April 30, 1980, the Michigan Court of Appeals, without oral argument, summarily dismissed the Plaintiffs-Appellants' Complaint for Mandamus for "lack of merit on the grounds presented". On June 19, 1980, the Michigan State Supreme Court denied the Plaintiffs-Appellants' Application for Leave to Appeal.

G. Judge Beer is a fully qualified and able judge of the Circuit Court for the County of Oakland, Michigan, and, but for his age, would be entitled to run for re-election to said office in the upcoming primary and general elections.

H. No other elected official in the State of Michigan is deprived of office by virtue of his or her age.

I. Notwithstanding the State of Michigan's apparent presumption embodied in its constitutional and statutory mandatory retirement provisions that judges are unfit for election to office upon reaching the age of seventy (70) years, the State relies upon judges aged seventy (70) and older to fill vacancies in judicial office. In the years 1977-1979, inclusive, five hundred twenty six (526) assignments were given to judges seventy (70) years of age or older. Pursuant to these assignments, judges seventy (70) years of age or older served a total of 2,506 days. Nearly fifty (50%) percent of the total number of assignments issued by the Michigan Supreme Court during this three (3) year period

were handled by judges seventy (70) years of age or older. (See attached letter of Einar Bohlin, Michigan State Court Administrator, Michigan State Court Administrative Office, dated March 11, 1980).

J. The Michigan constitutional and statutory mandatory retirement provisions do not require a judge who reaches the age of seventy (70) years while in office to retire; they only prohibit a judge from running for re-election if he has or will attain the age of seventy (70) years prior to the election. Michigan law provides for staggered terms for circuit judges of from six (6) to ten (10) years. Therefore, a judge whose seventieth birthday falls after the general election may continue to hold office for the remainder of his term, which could be as much as ten (10) years, or until he is nearly eighty (80) years old.

K. The people of the State of Michigan have created a Michigan State Judicial Tenure Commission, pursuant to the Michigan Constitution (1963), Article VI, Section 30, whose duty it is to examine and rule upon the fitness of any judge for judicial office within the State.

L. On the basis of the foregoing facts, taken in conjunction with prior decisions of this Honorable Court, and those of lower federal courts and state courts which

have ruled upon the constitutional issues raised herein, there is a meritorious basis for plenary consideration of this case by this Honorable Court.

(e) REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

A. The subject matter of this appeal involves legal principles of major constitutional significance because this Honorable Court shall be asked to decide whether, consistent with the standards of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, a presumptively competent and qualified judge of a Circuit Court for the State of Michigan may be summarily deprived of an opportunity to run for re-election to judicial office without a hearing for determination as to his fitness for office, solely because he has attained the age of seventy (70) years. As observed by Stephen Hess of the Brookings Institution, this is wrong. (Exhibit "A").

B. The rulings of the Michigan Court of Appeals and State Supreme Court have upheld the validity of constitutional and statutory mandatory retirement provisions in the face of a challenge that these provisions violate rights guaranteed the Plaintiffs-Appellants by the Constitution of the United States.

C. The rulings of the Michigan Court of Appeals and Supreme Court have upheld the validity of constitutional and statutory provisions which operate to deny the "voter

Plaintiffs" their constitutionally guaranteed right to vote for the candidate of their choice for the office of Circuit Judge for the County of Oakland, Michigan.

(f) NOTICE OF APPEAL DULY FILED

On July 2, 1980, Notice of the within Appeal was duly filed with the Michigan Supreme Court and the Michigan Court of Appeals.

WHEREFORE, the Plaintiffs-Appellants, the Honorable William John Beer, Thomas Plunkett, Barry Yaker, Frances R. Avadenka and Warren Newton, respectfully pray that this Honorable Court note probable jurisdiction over this appeal, permit the filing of Briefs, and set this appeal for oral argument.

Respectfully submitted,

Dated:_____

RAYMOND, RUPP & WIENBERG, P.C.

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AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the thirtieth day of April in the year of our Lord one thousand nine hundred and eighty

Present the Honorable

Daniel F. Walsh

Presiding Judge

Robert B. Burns
Donald E. Holbrook, Jr.
Judges

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs,

v

No. 50818

SECRETARY OF STATE OF THE STATE OF MICHIGAN, OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and MEMBERS THEREOF, MICHIGAN STATE BOARD OF CANVASSERS, ITS SECRETARY and MEMBERS THEREOF, OAKLAND COUNTY BOARD OF CANVASSERS and MEMBERS THEREOF, and DIRECTOR, BOARD OF ELECTIONS,

Defendants.

In this cause a complaint for mandamus and motion for order to show cause are filed by plaintiffs, and an answer in opposition thereto together with a motion for extension of time in which to file brief and a motion for immediate consideration of the motion for extension of time having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for order to show cause be, and the same is hereby DENIED for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the complaint for mandamus be, and the same is hereby DISMISSED.

IT IS FURTHER ORDERED that the motion for extension of time in which to file brief and motion for immediate consideration of the motion for extension of time be, and the same are hereby DENIED as moot.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and eighty

Clerk

CAJC180

AT A SESSION OF THE SU. .ME COURT OF THE STATE OF M IIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 30-159 & a

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs-Appellants,

v

SC: 65259
COA: 50818

SECRETARY OF STATE OF THE STATE OF MICHIGAN, OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and MEMBERS THEREOF, MICHIGAN STATE BOARD OF CANVASSERS, ITS SECRETARY and MEMBERS THEREOF, OAKLAND COUNTY BOARD OF CANVASSERS and MEMBERS THEREOF, and DIRECTOR, BOARD OF ELECTIONS,

Defendants-Appellees.

On order of the Court, the plaintiffs-appellants' motion for immediate consideration is considered, and it is GRANTED.

The application for leave to appeal is also considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Kavanagh and Moody, JJ., would grant leave to appeal.

Williams, J., not participating.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Jacqueline B. Thorne Clerk.
Deputy

State Court Administrative Office

NORTH WASHINGTON SQUARE, P. O. BOX 30048
LANSING, MICHIGAN 48909
517/373-0130

COURT ADMINISTRATOR
EINAR BOHLIN

March 11, 1980

Hon. William J. Beer
6th Circuit Court
1200 N. Telegraph Road
Pontiac, MI 48053

Dear Judge Beer:

At your request a review of the records of the State Court Administrative Office has been made and the following information gathered in an attempt to answer your questions.

1. Pursuant to what authority does the Supreme Court appoint Retired Judges to sit as visiting judges? In what year was this authority promulgated or instituted?

MCLA 600.226; MSA 27A.226, effective since 1964 provides that the Supreme Court may authorize any retired judge from any court of record to perform judicial duties in any court of record in the state where there is a judicial vacancy. Section 23 of Article 6 of the Michigan Constitution allows the Supreme Court to authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

2. How many judges retired in the State of Michigan in each of the last five years? How many of these judges were over the age of 70?

Year	No. Judges Retired
1975	17
1976	18
1977	10
1978	16
1979	14

A total of 75 judges retired in the past 5 years. Twenty of those judges were 70 or older.

3. How many retired judges have received assignments as visiting judges in each of the last five years? How many of these judges were over the age of 70?

Year	No. Inactive Judges Assigned	No. Judges Over 70
1975	19	7
1976	31	13
1977	60	22
1978	63	25
1979	77	26

(Inactive means retired, resigned or defeated.)

4. How many Retired Judges have requested but not received appointments as visiting judges? Upon what basis is such a refusal made?

Approximately 100 judges answered our questionnaire indicating they would be willing to accept assignments. Approximately 23 judges have not received assignments (1978-79 figures). These 23 judges did not receive assignments because appropriate assignments were not available for them. It should be noted that in making assignments, an attempt is made to assign cases to active judges before assigning them to inactive judges.

5. By what authority are these visiting judges compensated? What is the method or manner of compensation made? (i.e., per diem, per week, etc.) What is the rate of compensation. If the method is per diem, is compensation made for days actually on the bench or does it include days spent in preparation or writing opinions?

MCLA 600.226; MSA 27A.226 provides that an assigned judge shall receive the same salary and from the same source as provided for the vacant judicial office. The salary for each day that the judge serves shall be 1/250 of the salary of the vacant judge. The state shall pay necessary expenses incidental to performing the duties required by the assignment.

6. What is the source of funds used for compensating visiting judges? Is this fund unlimited or is it a specific appropriation? If the fund is specific, do funds ever run out, requiring visiting judges to work for free?

Funds for the payment of assigned judges are provided for by the legislature in the general appropriations bills. The judges would never be in a position of having to work for free.

7. What is the average length of an assignment for a visiting judge? What is the average number of assignments given to one judge in any given year?

Year	Average Length	Total Days Served*	Total No. Assignments
1975	3.5 days	578	164
1976	2.1 days	246	116
1977	3.5 days	795	226
1978	3.6 days	1,318	368
1979	2.8 days	1,387	496

(Average length of assignment determined by dividing total days served by the total number of assignments.)

Year	Average No. Assignments Per Inactive Judge	Total No. Assignments	Total No. Inactive Judges
1975	8.6	164	19
1976	3.9	116	31
1977	3.8	226	60
1978	5.8	368	63
1979	6.4	496	77

(Average assignments determined by dividing the total number of assignments by the total number of inactive judges.)

*Many assignments were not reported as to number of days served.

Addendum

1980 - Number of judges available for assignment 231
Number of judges requesting assignment 100
Number of judges 70 or over, available and willing to accept assignment 91

Number of judges 70 or older that received assignments:
1975 - 7
1976 - 13
1977 - 22
1978 - 25
1979 - 26

Number of Assignments to Judges 70 or older
1975 - 91
1976 - 64
1977 - 141 \
1978 - 159 / 526
1979 - 226

Number of days served by judges 70 or older (some judges have not reported number of days).

1975 - 348
1976 - 178
1977 - 516.5
1978 - 874 > 2506
1979 - 915.5

Year	Average # Assignments to Judges 70 or over	No. Assignments to Judges 70 or over	No. of Judges 70 or over
1975	13	91	7
1976	4.9	64	13
1977	6.4	141	22
1978	6.4	159	25
1979	8.7	226	26

Year	Average # days Served by Judges 70 or older	No. days served by Judges 70 or older	No. Assignments to Judges 70 or older
1975	3.8	348	91
1976	2.8	178	64
1977	3.7	516.5	141
1978	5.5	874	159
1979	4.0	915.5	226

(Average days served determined by dividing number of days served by judges 70 years old or older by the number of assignments to judges 70 years old or older.)

8. Has the State Court Administrator's Office done any studies on the productivity of Retired/Visiting Judges? If so, could you summarize the results?

No such study has been attempted by this office.

9. Would a retired judge's engaging in private practice preclude his receiving an appointment as a visiting judge?

Canon 5 of the Code of Judicial Conduct provides that a judge should not practice law for compensation except as otherwise provided by law. However, there appears to be no authority to prevent an attorney engaging in private practice from receiving an appointment so long as no conflict of interest is involved. The Supreme Court has a policy that no assigned judges practice law for the duration of any assignment.

I trust that the information provided satisfactorily answers your questions. If I can be of any further assistance, please feel free to contact me.

Sincerely,

Ejnar Bohlin

EB:j

'Not Qualified By Reason of Age'?

By STEPHEN HESS

The Bible rates the ancient Solomon as wondrous wise, but in the wisdom of the American Bar Association (ABA) he would not have been qualified to be appointed a U.S. judge.

THE ABA is the semiofficial rater of candidates for the federal bench. The attorney general gives the names of potential judges to the ABA and it then tells the government whether or not a candidate is qualified. The ABA has decreed that no person over the age of 64 should get an initial judicial appointment. The formal category it has devised is "not qualified by reason of age."

There is nothing about age in the "Standards and Guidelines for the Merit Selection of United States District Judges" (Executive Order 12097, Nov. 8, 1978). The President simply and correctly states that proposed nominees should be "of sound physical and mental health." Age discrimination apparently is something that the ABA thought up all by itself.

That the ABA has been given *de facto* veto power over the composition of the nation's judiciary raises serious questions about the extent to which elected officials should be allowed to abdicate their constitutional responsibilities.

ARE THERE NOT more interests involved than "peer review"? That the ABA considers age a criterion for successful service suggests that it does not even know what profession it represents. Technically, the effect of aging on job performance should be determined by medical researchers, not lawyers.

EXHIBIT "A"

There has been considerable speculation on this subject in the press. It relates, of course, to whether a 69-year-old male is fit to assume the duties of president. A most interesting article appears in The New Republic, written by Walter Shapiro of The Washington Post, who actually interviewed leading scientific experts, notably at the National Gerontology Center in Baltimore.

Mr. Shapiro concludes that "with few exceptions, they would all vote for a candidate of Mr. Reagan's age, if they respected his background, agreed with his politics, and were convinced that he was in good health." Mr. Reagan's age, in other words, is not a legitimate issue to most of those best able to judge."

IF THEY FEEL this way about the presidency, it should be obvious how the ability of a healthy person to serve as a judge would be judged by the scientists.

What about the historians? Surely they would note the ages of our most distinguished jurists. They might even find some correlations between age and wisdom.

Chief Justice John Marshall served on the Supreme Court for 15 years after his 65th birthday. Oliver Wendell Holmes was there for 26 additional years. Must the ABA ignore the lessons of history as well as science?

There is a certain irony in that the first person to have been denied a judgeship because of the ABA's age guideline is one of the most revered legal minds in the country.

Archibald Cox, Harvard Law School professor and former Watergate special prosecutor, was 67 years old when in 1979 he was the unanimous first choice of a panel that recommended candidates for a new seat on the First Circuit Court of Appeals (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico). Citing the ABA rule, then Attorney General Griffin B. Bell announced that Mr. Cox was too old.

MR. BELL, it will be recalled, had earlier resigned a federal judgeship, presumably because he could make more money in private practice. Perhaps older (still healthy) lawyers would find that serving on the federal bench is less of a hardship.

At the same time, there are several encouraging changes in the characteristics of the federal judiciary. According to Judith H. Parris of the Congressional Research Service, Library of Congress, the percentage of women nominated to the U.S. District Court has gone from 0.6 under Richard Nixon to 12.5 under President Carter, blacks from 2.8 to 11.8, and Hispanics from 0.0 to 6.3.

As for age discrimination, President Carter should tell the ABA that his Executive Order means exactly what it says. If, on the other hand, Mr. Reagan is elected, the issue becomes moot.

A 70-year-old President is hardly likely to believe that a 65-year-old judge is "not qualified by reason of age."

Stephen Hess is a senior fellow at the Brookings Institution.

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-2066

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Appellants,

vs.

RICHARD AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN; OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and THE HONORABLE NORMAN R. BARNARD, LYNN D. ALLEN, and C. HUGH DOHANEY, as Members thereof; MICHIGAN STATE BOARD OF CANVASSERS and BERNARD J. APOL, NANCY CHASE, JESSIE M. DILLARD, WALTER OLIVER, and WALLACE D. RILEY, as Members thereof; THE OAKLAND COUNTY BOARD OF CANVASSERS and BARBARA A. BRINKER, SARAH C. DICKSON, SANDRA KOKOTOVICH, PATRICIA A. SANDERSON, and LYNN D. ALLEN, as Members thereof; and BERNARD J. APOL, as Director, BOARD OF ELECTIONS,

Appellees.

On Appeal from the Supreme Court of the State of Michigan.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I.

WHETHER THERE IS A LEGITIMATE STATE INTEREST IN MAINTAINING THE STANDARDS ARTICULATED IN ARTICLE 6, § 19, OF THE 1963 MICHIGAN CONSTITUTION, FOR MEMBERS OF THE STATE JUDICIARY.

II.

WHETHER SUCH STANDARDS WHICH PROHIBIT APPOINTMENT OR ELECTION TO THE JUDICIARY AFTER 70 YEARS OF AGE ARE VIOLATIVE OF EITHER DUE PROCESS OR EQUAL PROTECTION.

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No. 79-2066

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Appellants,

vs.

RICHARD AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN; OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and THE HONORABLE NORMAN R. BARNARD, LYNN D. ALLEN, and C. HUGH DOHANEY, as Members thereof; MICHIGAN STATE BOARD OF CANVASSERS and BERNARD J. APOL, NANCY CHASE, JESSIE M. DILLARD, WALTER OLIVER, and WALLACE D. RILEY, as Members thereof; THE OAKLAND COUNTY BOARD OF CANVASSERS and BARBARA A. BRINKER, SARAH C. DICKSON, SANDRA KOKOTOVICH, PATRICIA A. SANDERSON, and LYNN D. ALLEN, as Members thereof; and BERNARD J. APOL, as Director, BOARD OF ELECTIONS,

Appellees.

On Appeal from the Supreme Court of the
State of Michigan.

MOTION TO DISMISS OR AFFIRM

The Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move the Court to dismiss the appeal herein or, in the alternative, to

affirm the final judgment and decree of the Supreme Court of the State of Michigan on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as to warrant no further argument.

JUDGMENT BELOW

This lawsuit originated as a Mandamus action in the Michigan Court of Appeals. The Complaint for Mandamus was dismissed on May 9, 1980, and an Application for Leave to Appeal was filed in the Michigan Supreme Court. That Application was denied on June 19, 1980.

In effect, the Supreme Court of the State of Michigan upheld the validity of Article 6, § 19, of the Constitution of Michigan (1963), which provides that no person may be elected or appointed to a judicial office after reaching the age of 70 years. Both orders are attached to the Jurisdictional Statement.

JURISDICTION

A mandamus action was initiated in the Michigan Court of Appeals pursuant to 1963 Michigan General Court Rule 714 alleging that the due process and equal protection clauses of the United States Constitution would be violated if a judge were prohibited from seeking reelection because he had attained the age of seventy. The candidate argued that Article 6, § 19 of the 1963 Michigan Constitution and the enabling statutes should not be enforced.

The candidate was not successful and filed an Application for Leave to Appeal to the Michigan Supreme Court pursuant to 1963 Michigan General Court Rule 853. Leave to Appeal was denied.

A Jurisdictional Statement was filed in this Court on June 28, 1980. Jurisdiction was predicated on 28 USC 1275(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Michigan Constitution (1963), Article 6, § 19, provides:

> "The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

MCLA 168.411; MSA 6.1411 provides:

> "No person shall be eligible to the office of judge of the circuit court who is not a qualified elector of the judicial circuit in which election is sought, as provided in section 11 of article 6 of the state constitution, who is not licensed to practice law in this state and who at the time of election is 70 years of age or older."

MCLA 168.413a; MSA 6.1413(1) provides:

> "Any incumbent circuit court judge may become a candidate in the primary election for the office of which he is an incumbent by filing with the secretary of state an affidavit of candidacy not less than 120 days prior to the date of the primary election.
>
> "The affidavit of candidacy shall contain statements that the affiant is an incumbent circuit court judge for the circuit in which election is sought, that he is domiciled within the circuit, that he will not attain the age

of 70 by the date of election and a declaration that he is a candidate for election to the office of circuit court judge."

STATEMENT OF THE CASE

Appellant, William J. Beer, is a circuit judge in Oakland County, Michigan. Appellant Beer was first elected to that position in April, 1959 and has continually served until the present time. Judge Beer was last elected in November, 1974, to serve a six year term which will expire on December 31, 1980.

Appellant Beer attained 70 years of age on February 17, 1979. However, despite the state constitution and statutes, he sought to file affidavits as a candidate for reelection.

The Elections Division of the Michigan Department of State refused to accept the affidavits and notified Appellant Beer that he was prohibited from seeking reelection pursuant to Michigan Constitution 1963.

In consequence thereof an action for mandamus was brought in the Michigan Court of Appeals seeking to compel the state to place Appellant Beer's name on the ballot in the upcoming primary and general elections. The individual voter appellants in the original action alleged that the qualifications imposed upon the putative candidate violated their constitutional right to vote for the candidate of their choice.

On May 9, 1980, the Michigan Court of Appeals denied Appellant's Motion for an Order to Show Cause, specifically found a lack of merit in the grounds presented, and ordered that the complaint for mandamus be dismissed. A copy of the Court of Appeals order is contained in the appendix to Appellant's Jurisdictional Statement.

An appeal from that order was taken to the Supreme Court of the State of Michigan, and on June 19, 1980, the Supreme Court issued its order denying the Application for Leave to Appeal on the grounds that the court was not persuaded that the questions presented should be reviewed. A copy of the Supreme Court order is also contained in the appendix to Appellant's Jurisdictional Statement.

From that order of the Michigan Supreme Court, Appellants seek to have this Court note probable jurisdiction over the appeal, permit the filing of briefs, and set the matter for oral arguments.

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

I.

THERE IS A LEGITIMATE STATE INTEREST IN MAINTAINING THE STANDARDS ARTICULATED IN ARTICLE 6, § 19, OF THE MICHIGAN CONSTITUTION FOR MEMBERS OF THE STATE JUDICIARY.

In 1955, the Michigan Senate and House of Representatives proposed an amendment to Const 1908, art 7, § 17. The amendment was presented to the electorate in the form of 1955 PA J.R. 2, and added the following sentence to art 7, § 17, *supra*:

> "Justices of the supreme court and judges of all circuit courts in this state elected or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state."

The amendment was ratified by the people on April 4, 1955, and, thus, became a part of the Michigan Constitution. The

people, by direct vote, expressed approval of the dual qualifications of being licensed to practice law and being less than 70 years of age as reasonable and desirable standards for state judicial officers.

At the Constitutional Convention of 1961, many of the provisions of Const 1908, art 7, § 17 were simply retained in the new document and specifically the maximum age limitation was again embodied as part of Const 1963, art 6, § 19.

The same qualifications were approved by the delegates to the Constitutional Convention of 1961. A study of the Official Record of the Convention reveals that although much debate was held on the question of requiring a license to practice law as a qualification for holding judicial office, there was very little discussion of the maximum age qualification.

It is important to note that although there is a paucity of language on the topic, that surely should not be taken as a lack of concern for the age requirement. The record shows that the Committee on the Judiciary proposed to the Convention that the language "shall not" be stricken from the sentence and the words "no person shall" inserted so that the sentence would read, "and no person shall be elected or appointed to a judicial office after reaching the age of 70 years."

In making that proposed amendment, which was adopted by the Constitution, Delegate Danhof stated:

> ". . . —Mr. Ford, the Vice-Chairman of my committee, and myself offer this amendment so as to make sure that the 70 year age requirement is maintained within the constitution.
>
> • • •
>
> "Mr. Rajkovich [delegate] stated it was not their intention to disturb this [age limit] . . ."

1 Official Record, Constitutional Convention 1961, p 1501

The legitimate state interest which the delegates were seeking to advance was an effective and efficient judicial system. The words of Delegate Everett explain their concerns in a most cogent fashion:

> "Let me say this. I would not suggest for a moment—and I don't think anybody here would suggest—that the framework is the total answer. Because a good system can produce bad judges, and a bad system can produce good judges. But, in the final analysis, the system if it is sound is much more likely to provide a good judiciary and a good judicial system for the people of the state than a bad one is."

1 Official Record, Constitutional Convention 1961, p 1482

By adopting the proposed Constitution in 1963, the voters directly approved for the second time the mandatory retirement age for judges.

In *Aronstam* v *Cashman*, 325 A2d 361 (Vt, 1974), the very same questions raised in this case were presented to the Vermont Supreme Court. There two assistant judges, and several of their constituents who stated that they would vote for the assistant judges if they were candidates, brought suit to compel certain county clerks to accept their nominating petitions for reelection. The clerks had refused because both judges were over 70 years of age and Vermont had a mandatory retirement age of 70 years.

The Court held that the mandatory retirement age of 70 years for assistant judges promoted the legitimate state interest of imposing the highest possible standards for the judiciary

and did not violate the plaintiffs' rights to equal protection of the law.

In reaching their conclusion, the Vermont Supreme Court was guided by the dual essential inquiry test outlined by Justice Powell in *Weber* v *AETNA Casualty and Surety Co,* 406 US 164; 92 S Ct 1400; 31 L Ed 2d 768 (1972):

1. What legitimate state interest does the classification promote?

2. What fundamental personal rights might the classification endanger?

The people of the State of Michigan, like the citizens of Vermont, have a legitimate state interest in requiring the highest possible standards for members of the judiciary by minimizing, as far as possible, the threat of an obviously disabled judge continuing to preside. In attempting to promote and further that interest, the people amended one Constitution to include the 70 year maximum age qualification for a judge and approved a subsequent Constitution containing the same proviso.

In addition, this is not the sole method utilized to insure that the highest possible standards are required of the Michigan judiciary. See, for example, the Michigan Code of Judicial Conduct which was adopted by the Michigan Supreme Court on October 1, 1974. The various canons of the Code of Judicial Conduct require that judges should, for instance, refrain from political activity which is inappropriate to their judicial office; regulate extrajudicial activities to minimize the risk of any conflict with judicial duties; and avoid appearances of impropriety in all activities.

The United States Court of Appeals for the Second Circuit was faced with the same question regarding the state's interest

in imposing age restrictions upon New York state judges. The Court determined that such restrictions were a matter for the legislative process of the state and held:

> "We do not deem age to be a suspect classification requiring any strict scrutiny of the state's scheme of age restrictions upon judicial terms of office. . . . *It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable.*" (emphasis added)
>
> *Rubino* v *Ghezzi*, 512 F2d 431, 433 (CA 2, 1975), *cert den*, 423 US 891 (1975)

The weight of authority has established that mandatory age requirements for judicial officers meet many legitimate and valid state interests, and there is a rational relationship between a maximum age as one qualification for judicial office and the end sought to be accomplished.

II.

STANDARDS WHICH PROHIBIT APPOINTMENT OR ELECTION TO THE JUDICIARY AFTER 70 YEARS OF AGE DO NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

This Court has developed a two-tiered approach to equal protection cases. If the interest is deemed to be "fundamental" or if the classification is "suspect," the Court will apply a "strict scrutiny" test which requires that the state display a "compelling interest" to support or justify the classification. Other legislative and constitutional provisions are subject to

review under the traditional equal protection test which requires only a showing of a "rational relationship" between the legislation and the end to be accomplished.

Since age is not a "suspect classification," *Manson* v *Edwards*, 482 F2d 1076 (CA 6, 1973), the "strict scrutiny" test is not applicable and the state is not required to show a "compelling interest" which justifies the classification. Rather, the constitutional provision setting the 70 year maximum age is subject only to the rational relationship test.

The traditional equal protection test in Michigan is set forth in *Naudzius* v *Lahr*, 253 Mich 216, 222, 223; 234 NW 581, 583 (1931), as follows:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' Lindsley* v *Natural Carbonic Gas Co.*, 220 US 61, 78; 31 S Ct 337, 340; 55 L Ed 369, 377 (1911)." (emphasis added)

In *Massachusetts Board of Retirement* v *Murgia*, 427 US 307; 96 S Ct 2562; 49 L Ed 2d 520 (1976), this Court in a

per curiam opinion upheld the constitutionality of a Massachusetts statute which provided that members of the uniformed state police would be mandatorily retired at age 50. This Court found that the rational basis test was the proper standard by which the statute should be tested.

> "This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. . . . Accordingly, *we have expressly stated that a standard less than strict scrutiny has consistently been applied to state legislation restricting the ability of employment opportunities.*" (emphasis added)
>
> *Massachusetts Board of Retirement* v *Murgia, supra,* 427 US at 313; 96 S Ct at 2566; 49 L Ed 2d at 524

Federal courts have uniformly upheld mandatory retirement statutes and constitutional provisions, see *Retail Clerks U, Local 770* v *Retail Clerks Int Ass'n,* 359 F Supp 1285 (CD Calif, 1973); *Lewis* v *Tucson School District No 1,* 23 Ariz App 154; 531 P2d 199 (1975); *Armstrong* v *Howell,* 371 F Supp 48 (DC Neb, 1974); *Weisbrod* v *Lynn,* 383 F Supp 933 (DC DC, 1974), *affg,* 420 US 940; 95 S Ct 1319; 43 L Ed 2d 420 (1975), *reh den,* 423 US 886; 96 S Ct 162; 46 L Ed 2d 118 (1975).

As recently as March, 1979, the United States Court of Appeals for the Seventh Circuit considered the question presented in this case. A judge facing a 70 year mandatory retirement age, along with several voter plaintiffs who claimed a denial of their right to vote for the candidate of their choice, brought suit to have the statute declared unconstitutional. In *Trafelet* v *Thompson,* 594 F2d 623, 627 (CA 7, 1979), *cert den,* . . . . US . . . .; 100 S Ct 219; 62 L Ed 2d 142 (1975), the Court said:

> "The equal protection clause does not prohibit the legislature from adopting a more rigorous policy for assur-

ing excellence in the judiciary than for other elective offices. As the Supreme Court said of the Foreign Service in *Vance* v. *Bradley, supra,* .... U. S. at ...., 99 S.Ct. at 956.

" 'The judgment that the Foreign Service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be "fixed only by the people acting through their elected representatives." '

"Citing *Fireman* v. *Chicago, R.I. & P.R. Co.,* 393 U.S. 129, 138, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968)."

After further discussion of the merits of the case, the *Trafelet* Court detailed some of the authority supporting mandatory retirement ages:

"Our conclusion that mandatory retirement for judges at age 70 does not violate the equal protection clause is supported by the case law involving mandatory retirement of various kinds of governmental officers and employees. *Vance* v. *Bradley, supra,* .... U.S. ...., 99 S.Ct. 939, 59 L.Ed.2d 171; *Massachusetts Board of Retirement* v. *Murgia, supra,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520; *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891 96 S.Ct. 187, 46 L.Ed.2d 122 (1975); *Palmer* v. *Ticcione,* 576 F.2d 459 (2d Cir. 1978), *cert. denied,* .... U.S. ...., 99 S.Ct. 1421, 59 L.Ed.2d 633 (1971); *Johnson* v. *Lefkowitz,* 566 F.2d 866 (2d Cir. 1977); *Weisbrod* v. *Lynn,* 383 F.Supp. 933 (D.D.C. 1974), *aff'd summarily,* 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975); *McIlvaine* v. *Pennsylvania State Police,* 454 Pa. 219, 309 A.2d 801 (1973), *appeal dismissed for want of substantial federal question,* 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974)."

Trafelet, supra, 629

The Court of Appeals then reached the following decision regarding the claimed equal protection violation:

> "Having concluded that the classification adopted by the legislature is not suspect, does not impair fundamental rights, and is rationally related to a legitimate state purpose, and therefore satisfies the requirements of equal protection, we cannot find it unconstitutional as creating an irrebuttable presumption."
>
> *Trafelet, supra,* p 630

Appellants have not met the burden of proving that Michigan does not have a legitimate interest in requiring the standards set forth in the State Constitution for judicial officers.

Appellant Beer bases his due process claim on the "irrebuttable presumption doctrine," which was developed in a series of cases, *Stanley* v *Illinois,* 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *Vlandis* v *Kline,* 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973); and *Cleveland Board of Education* v *LaFleur,* 414 US 632; 74 S Ct 791; 31 L Ed 2d 52 (1974). While the validity of the doctrine is not questioned here, the scope of the doctrine and its application to a mandatory retirement age is questioned.

In *Weinberger* v *Salfi,* 422 US 749; 95 S Ct 2457; 45 L Ed 2d 522 (1975), this Court limited the doctrine by holding that the provisions of the Social Security Act precluding a wage earner's widow and stepchild from receiving social security benefits if there had not been a continuing relationship for 9 months prior to the wage earner's death was not an irrebuttable presumption.

This Court found that the rights involved in the trilogy of cases, *Stanley-LaFleur-Vlandis, supra,* were so fundamental

that any restrictions upon these rights would violate due process. *Weinberger, supra,* pp 771-773. In contrast, it was held in *Weinberger* that there was a "noncontractual claim to receive funds from the public treasury which enjoys no constitutionally protected status." *Weinberger, supra,* p 772.

The doctrine of irrebuttable presumption is limited by *Weinberger, supra,* to presumptions dealing with fundamental rights such as the right to conceive and raise children, *Stanley, supra,* and the right of freedom of choice in matters of marriage and family life, *LaFleur, supra.*

The rights involved in this lawsuit, the right to judicial and elected office, are not fundamental. In *Trafelet* v *Thompson, supra,* the Seventh Circuit Court of Appeals stated:

> "Neither the right of governmental employment, *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), nor the right to run for elective office, *Bullock* v. *Carter,* 405 U.S. 134, 142-143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), is fundamental. See J. Nowak, R. Rotunda, and J. N. Young, *Handbook on Constitutional Law* 686 and 643 (1978) and L. Tribe, *American Constitutional Law,* § 13-19 at 775-777 (1978). Judicial office is no exception. *Napolitano* v. *Ward,* 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied,* 409 U.S. 1037, 92 S.Ct. 512, 34 L.Ed.2d 486 (1973)."

Therefore, the use of the doctrine of irrebuttable presumption would be inappropriate in this case because the rights involved are not fundamental.

Although this Court has not ruled directly on the subject of irrebuttable presumption as it relates to mandatory retirement, several federal cases have consistently decided the very same issue.

The United States Court of Appeals for the Sixth Circuit in *Talbot* v *Pyke*, 533 F2d 331, 333 (CA 6, 1976), dismissed the argument that a municipal park district's policy of mandatory retirement at age 70 denied the plaintiff due process because of an irrebuttable presumption based upon age. Citing *Weinberger, supra,* as authority, the Court stated that the doctrine was not applicable.

In *Trafelet, supra,* the Seventh Circuit Court of Appeals stated that the doctrine did not apply in the mandatory retirement scheme involved. Expressing concern with the validity of the doctrine coupled with the difficulty of application in an earlier opinion, *Miller* v *Carter*, 547 F2d 1314, 1316-1319 (CA 7, 1977), *aff'd*, 434 US 356; 98 S Ct 786; 54 L Ed 2d 603 (1978), the Court stated in *Trafelet, supra*:

> ". . . Since our decision in *Miller,* the Supreme Court has not relied upon the doctrine in any case, although the Court has had several opportunities to do so. *Vance* v. *Bradley, supra,* is the second mandatory retirement decision in which the Supreme Court has not referred to the irrebuttable presumption doctrine; even Justice Marshall, the lone dissenter, although specifically pointing out that the district court judgment invalidating the statute which the Court was reviewing could be sustained on any ground finding support in the record, did not mention the irrebuttable presumption doctrine. See also *Friedman* v. *Rogers*, ... U.S. ...., ... n.8, 99 S.Ct. 887, 893, 59 L.Ed.2d 100, 108 (1979); *First National Bank* v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 490 N.18, 97 S.Ct. 1898, 52 L.Ed. 2d 513 (1977); *Fiallo* v. *Bell*, 430 U.S. 787, 791, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), *Cf. Elkins* v. *Moreno*, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614

(1978). See *DeLaurier* v. *San Diego Unified School District,* 588 F.2d 674 at 682-683 n.16 (9th Cir. 1978)."

Trafelet, supra, p 629

The *Trafelet* Court then dismissed the irrebuttable presumption based upon equal protection language.

In *Weisbrod* v *Lynn, supra,* the Court dismissed a suit by a federal employee claiming that 5 USC 8335 was unconstitutional because it mandated retirement at age 70. In dismissing the suit, the Court took particular note of *McIlvaine* v *Pennsylvania State Police, 6 Pa Commonwealth* 505; 296 A2d 630 (1972), *aff'd* 454 Pa 219; 309 A2d 801 (1973), *app dism'd,* 415 US 986; 94 S Ct 1583; 39 L Ed 2d 884 (1974), wherein a case with identical issues (mandatory retirement at age 60) was also dismissed for want of a substantial federal question. Most importantly, the district court noted that the "irrebuttable presumption argument" was made to, and rejected by, this Court in *McIlvaine, supra.* The district court in *Weisbrod, supra,* stated:

"This framing of the basic issue in *McIlvaine* convinces this Court that the Supreme Court was certainly not ignorant of the due process issue before it. Only two months prior to the *McIlvaine* decision, Justice Rehnquist had observed: " '[T]he Court will have to strain valiantly in order to avoid having today's opinion [relying primarily on the doctrine of irrebuttable presumption] lead to the invalidation of mandatory retirement statutes for governmental employees.' If the remaining Supreme Court Justices had agreed with Justice Rehnquist's conclusion, the Court would not have disposed on *McIlvaine* on the grounds that it failed to present a substantial federal question."

Weisbrod, supra, p 937

In *Rubino, supra,* the Court of Appeals for the Second Circuit upheld the constitutionality of mandatory retirement of state judges at age 70, affirmed an order denying a motion to convene a three judge district court, and dismissed the complaint. The Court cited *Weisbrod, supra,* and *McIlvaine, supra,* as a basis for its determination of an insubstantial federal question and determined that the due process and equal protection questions were substantially similar, if not identical.

The Second Circuit reaffirmed the holding of *Rubino, supra,* in *Palmer* v *Ticcione,* 576 F2d 459 (1978), *cert den,* 440 US 954; 99 S Ct 1421; 59 L Ed 2d 633 (1979), and dismissed a due process attack on the New York Compulsory Retirement System as creating an irrebuttable presumption. The Court stated:

> "We reach the same conclusion with regard to the due process attack on compulsory retirement as establishing an irrebuttable presumption. That claim is analytically very similar to the equal protection one. If the statutory classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption. Moreover, the due process claim was before the Court in *McIlvaine* v. *Pennsylvania,* 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974), and *Weisbrod* v. *Lynn,* 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975), *aff'g* 383 F.Supp. 933 (D.D.C. 1974), and this court in *Rubino* v. *Ghezzi,* 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975). In each case it was rejected."
>
> *Palmer* v *Ticcione, supra,* pp 463-464

On May 13, 1980, in *Malmed* v *Thornburg,* .... F2d .... (CA 3, 1980), Docket No. 79-2467, 48 LW 2767 (May 27, 1980), the United States Court of Appeals for the Third District reversed the finding of a district court that concluded

that a constitutionally mandated retirement age for judges was void as creating an irrebuttable presumption of incompetence based on age.

The Court of Appeals remanded the case with directions to enter judgment in favor of the appellants. Significantly, the Court stated that the important issue to be decided was:

> ". . . Is the mandatory retirement age rationally related to the accomplishment of *any* legitimate state objective?"
>
> *Malmed, supra,* p 29

The Court concluded that the constitutionally provided mandatory judicial retirement at age 70 was rationally related to a legitimate legislative objective.

> "In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. 'For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . .' *Flemming* v. *Nestor,* 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger* v. *Salfi,* 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.,* 348 U.S. 483, 487-90 (1955); *Trafelet* v. *Thompson,* 594 F.2d 623, 626 (7th Cir.), *cert. denied,* .... U.S. ...., 48 U.S.L.W. 3239 (Oct. 1, 1979). The legitimate purpose justifying the provision need not be the primary purpose of the provision. *McGinnis* v. *Royster,* 410 U.S. 263, 276 (1973) . . . ."
>
> *Malmed, supra,* p 7

The Third Circuit found that the lower court had erroneously placed the burden of proof on the defendants to rebut the claim of a due process violation and held that the proper approach is to require the complaining party to show that the constitutional convention had no reasonable basis for believing in their reasons for the adoption of the mandatory retirement provisions.

The irrebuttable presumption argument was also raised in *Malmed*:

> "Thus, we do not read the irrebuttable presumption decisions as deviating substantially from the traditional tests for violations of the due process clause. Because no suspect class or fundamental interest is implicated in this case, we must apply the standard as explained in *Weinberger* v. *Salfi,* 422 U.S. at 777:
>
> "[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylatic provisions, and would be directly contrary to our holding in *Mourning* [v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973)]. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than non-members. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."
>
> *Malmed, supra,* p 21

The United States Court of Appeals for the Third Circuit has clearly, concisely, and effectively answered every question raised by plaintiffs-appellants in this case.

Finally, this Court, by a vote of 8-1, affirmed a three judge district court's ruling that upheld the constitutionality of a mandatory state retirement age of 65 for attorney-hearing examiners. *Slate* v *Noll,* 474 F Supp 882 (WD Wis, 1979), *aff'd,* .... US ....; 100 S Ct 655; 62 L Ed 2d 637 (1980).

The rulings enunciated by the Courts of Appeals in the Second, Third, Sixth, and Seventh Circuits, as well as the prior decisions of this Court, conclusively defeat the argument that either due process or equal protection violations have occurred.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the Appellants present no substantial question for the decision of this Court, and pray that the appeal be dismissed or the judgment of the Michigan Supreme Court be affirmed.

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